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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
TOKYO, JAPAN

March 3, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Reply Comments of the Local Governments in
the Horizontal and Vertical Ownership
Limits, Cross-Ownership Limitations and
Anti-Trafficking Provisions
Rule Making Proceeding--MM Docket No. 92-264

Dear Ms. Searcy:

Please find attached on behalf of the National
Association of Telecommunications Officers and Advisors,
et al., an original and 11 copies of the Reply Comments
of the National Association of Telecommunications
Officers and Advisors, et al., filed in the above-
referenced proceeding.

Any questions regarding the submission should be
referred to the undersigned.

Sincerely,



Bruce A. Henoch

Attachment

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Implementation of Sections 11)
and 13 of the Cable Television)
Consumer Protection and)
Competition Act of 1992)

MM Docket No. 92-264

Horizontal and Vertical)
Ownership Limits,)
Cross-Ownership Limitations and)
Anti-trafficking Provisions)

TO: The Commission

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS, THE NATIONAL
LEAGUE OF CITIES, THE UNITED STATES
CONFERENCE OF MAYORS, AND THE NATIONAL
ASSOCIATION OF COUNTIES

Norman M. Sinel
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Counsel for Local Governments

March 3, 1993

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SUMMARY

Sections 11 and 13 of the 1992 Act are an important part of the consumer protection scheme enacted by Congress to ensure reasonable rates, quality of service, and diversity of programming available to subscribers. The language of the statute evidences Congressional intent that local franchising authorities, as the entities closest and most familiar with the day-to-day operations of cable operators, play a large role in enforcement. Local Governments urge the Commission to adopt rules that allow franchising authorities to carry out this responsibility as effectively as possible.

Local Governments oppose the suggestion of several commenters that the Commission limit or restrict the ability of franchising authorities to obtain all relevant information in connection with requests to transfer ownership of a cable system. Franchising authorities have a responsibility to the public to ensure that the proposed owner of a cable system is qualified, and must have access to a wide variety of relevant information relating to the proposed owner and the transfer in order to carry out this duty effectively. In addition, the statute provides for a

time limit -- 120 days -- only in instances where the 3-year holding period has passed.

Further, implementing a high threshold such as 50% for transfer of control would have the effect of allowing a large number of transfers of control to escape scrutiny. Instead, the Commission should adopt a rebuttable presumption that a transfer of control has occurred upon a transfer of at least 5% of interest in a cable operator.

Contrary to the assertions of the cable industry, Local Governments believe that franchising authorities are in the best position to enforce channel occupancy limits. To allow franchising authorities to carry out this responsibility, the Commission should require cable operators to disclose periodically those programmers in which the cable operators have an attributable interest.

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ASSOCIATION OF COUNTIES

The National Association of Telecommunications
Officers and Advisors, the National League of Cities, the
United States Conference of Mayors, and the National
Association of Counties (collectively, the "Local
Governments") submit these reply comments in the
above-captioned proceeding.

I. INTRODUCTION

The Federal Communications Commission ("FCC" or
"Commission") issued the Notice of Proposed Rule Making
("NPRM") in this proceeding as part of its implementation

of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"). Local Governments recommended in their comments that franchising authorities have full access to all information that a franchising authority deems necessary or appropriate in connection with a proposed transfer. Further, consistent with the 1992 Act and local law, as well as many existing franchise agreements, Local Governments suggested that each transfer should be subject to a case-by-case review by the franchising authority to determine whether a change of working control has occurred. In addition, the Local Governments stated that the channel occupancy limits should be enforced by franchising authorities.

Sections 11 and 13 of the 1992 Act are an important part of the consumer protection scheme enacted by Congress to ensure reasonable prices, quality of service, and diversity of programming available to subscribers. Consistent with that scheme, Congress intended for the Commission and franchising authorities jointly to enforce compliance with these provisions, yet several commenters urge the Commission to limit severely the ability of franchising authorities to carry out their responsibilities.

Local Governments oppose the suggestion by several commenters that the Commission limit or restrict the ability of franchising authorities to obtain the

information a franchising authority believes it needs in connection with requests to transfer ownership of cable systems. Restricting access of local franchising authorities to relevant information disserves the public interest in a complete and thorough review of transfer requests. Moreover, it is contrary to the purpose and intent of the statute and is inconsistent with the legislative history. A franchising authority's obligation to ensure that an operator is qualified would be severely hampered were the Commission to limit access by the franchising authority to all relevant information concerning the transfer and the qualifications of the proposed franchisee.

The Local Governments also oppose the suggestion that franchising authorities should be limited in all circumstances to 120 days to approve a request for a transfer. This suggestion is contrary to the express language of the statute, which provides for a 120-day time limit only in instances where the 3-year holding period has passed. In addition, the 120-day period should only begin to run after the franchising authority has received all requested information.

The Local Governments oppose the suggestion that only transfer requests involving transfers of 50% or more of equity in a system would implicate the 3-year holding requirement. Such a rule could have the effect of allowing

a large number of transfers of control to escape the necessary review in the public interest.

With regard to the channel occupancy limits, the Local Governments dispute the suggestion by several commenters that franchising authorities should not enforce such limits, and should not have access to information necessary to enforce the limits. Franchising authorities are in the best position to monitor and enforce the channel occupancy limits. To assist franchising authorities in carrying out this responsibility, the Commission should require cable operators to disclose periodically those programmers in which the operators have an attributable interest.

II. DISCUSSION

A. Franchising Authorities Must Have Access to All Relevant Information in Connection with a Request for Transfer of Ownership.

Local Governments oppose suggestions by several commenters that the Commission limit franchising authorities' access to information concerning requests for approval of transfers of ownership under the anti-trafficking provision.¹ For example, the National Cable Television Association ("NCTA") states that "there

¹ See, e.g., Joint Comments of Cablevision Industries Corp. and Comcast Corp., filed Feb. 9, 1993, at 28-29; Comments of Time Warner Entertainment Co., L.P., filed Feb. 9, 1993, at 45-53; and Comments of the National Cable Television Association, filed Feb. 9, 1993, at 51-53.

appears to be no need for the extensive information delineated in the legislative history in connection with every transfer of a cable system."² This statement, as well as similar statements by other cable operators, ignores the role of the local franchising authority in ensuring that a cable operator entrusted with a franchise has the ability and the expertise to provide quality cable service that meets local needs and interests. A transfer of ownership raises the same concerns about a potential owner's fitness to provide service as does an initial request to obtain a franchise; the franchising authority has the same inherent power in a transfer situation to request the information it needs to determine whether the proposed transferee is qualified and will provide adequate service to the community. Nothing in the 1992 Act limits this power.

The franchising authority has a responsibility to subscribers to ensure that the owner of the cable system is qualified to operate the system and that the owner is able to provide the required level of service that meets local needs and interests. To carry out this responsibility, the franchising authority must evaluate potential owners or persons exercising working control of a system to ensure that they meet certain financial, technical and character

² NCTA Comments at 52.

requirements. To undertake such an evaluation, a franchising authority may require financial statements and financing plans to demonstrate that the proposed transferee has or will have the financial capability to upgrade, operate and maintain the system as may be required in the franchise agreement which will bind the new owner. A cable operator must also demonstrate that it has the ability to comply with all of the franchise requirements, which often include minimum technical requirements, customer service standards, PEG requirements, and other public benefit provisions that meet local needs and interests. Further, the franchising authority must look into the background of the proposed owner or persons who will exercise working control to ensure that the proposed owner is qualified to operate the system.

Typically, once the franchising authority receives and analyzes the information from the relevant parties, it schedules public hearings to obtain public views on the proposed transfer, including the information submitted and staff recommendations, and to make final decisions on the approval or disapproval of the transfer request. It is vital to the integrity of the public process that the public and the decision-makers have available all information relevant to the transfer request and the issues to be decided. Congress was fully aware that franchising authorities need access to information in connection with

transfer requests. To make it crystal clear that the statute was not intended to interfere with a franchising authority's rights and powers to obtain such information, the legislative history stated that Section 617 was

not intended to limit, or give the FCC authority to limit, local authority to require in franchises that cable operators provide additional information or guarantees with respect to a cable sale or transfer.³

Congress recognized that, in order for franchising authorities to carry out effectively their responsibilities to subscribers, they must be allowed to have access to all relevant information.

B. The 120-Day Period Applies Only Following the Expiration of the 3-Year Holding Period.

Local Governments disagree with Time Warner's assertion in its comments that a franchising authority has been given 120 days within which to approve any transfer request -- including a transfer request for a franchise held less than 3 years. The 1992 Act makes clear that this time limitation only applies to transfers taking place following the expiration of the 3-year holding period.⁴

³ H.R. Rep. No. 628, 102d Cong., 2d Sess., 120 (1992) ("House Report").

⁴ Section 617(e) provides that "[i]n the case of any sale or transfer of ownership of any cable system after the 36-month period following acquisition of such system, a franchising authority shall, if the franchise requires franchising authority approval of a sale or transfer, have 120 days to act upon any request for approval. . . ." (emphasis added).

The statute imposes no time limits within which franchising authorities must act on requests for transfers made during the 3-year holding period. Congress recognized that a franchising authority may need more than 120 days to review a transfer request subject to the holding period since such a request raises complicated issues not raised by other transfer requests -- such as whether a waiver of the holding period is in the public interest, or whether a statutory exception to the holding period is met. In addition, any review period should only begin to run after the franchising authority has received all requested information.

C. The Commission Should Adopt a Rebuttable
Presumption of Transfer of Control Upon a Five
Percent Transfer of Interest

Local Governments oppose suggestions by several cable operators that a transfer of control for purposes of the anti-trafficking provision should only be deemed to occur upon a transfer of at least 50% of the equity of the cable system.⁵ As the Local Governments stated in their comments, such a rule would have the effect of allowing a large number of transfers of control to escape compliance with the provision.⁶ Transfer of actual working control of a cable system may occur when even a small percentage of

⁵ See, e.g., NCTA Comments at 40-43.

⁶ Comments of NATOA, et al, filed Feb. 9, 1993 at 10-11.

equity interest changes hands or when management changes hands. Many large MSOs are publicly held corporations with no majority shareholders. "Control" of such a corporation can change based on transfers of relatively small percentages of stock. Adopting a fixed threshold, especially one as high as 50%, could operate to exclude many significant transfers from review under the statute -- thus undermining the protections Congress intended for subscribers. The Commission should instead adopt a flexible approach wherein transfers of over 5% of equity interest will be examined on a case-by-case basis to determine whether a change of control has occurred.⁷ Such an approach is consistent with Congress' intent to protect consumers from the rise in rates and decline in service that can occur as a result of "profiteering" in cable system transfers.⁸

D. The Commission Should Adopt a Five Percent
Attribution Standard.

Local Governments oppose suggestions that the Commission should adopt, for the purposes of both the channel occupancy limits and the subscriber limits, an

⁷ Comments of NATOA, et al at 10-11.

⁸ More than one person can have working control of an entity. The franchise agreement between the Borough of Manhattan and Time Warner, for example, provides for a rebuttable presumption of control for any person or group of persons holding 5% or more of the operator's equity, and states explicitly that control may be held simultaneously by more than one person or group of persons.

attribution standard that exceeds five percent.⁹ The adoption of a different standard would reverse longstanding Commission policy of using a 5% attribution standard. The Commission has acknowledged in numerous other contexts that a person with more than a 5% interest in an entity has the potential to exert influence and control over such an entity. For example, the Commission recently stated that, with regard to broadcast/cable cross-ownership, "we have determined that 5% ownership is an appropriate threshold for identifying the point at which ownership in a publicly traded entity may create the potential for influence or control."¹⁰ Commenters in this proceeding have not presented valid reasons why the Commission should depart from such longstanding policy and adopt a different attribution rule to apply to its channel occupancy and subscriber limit rules. In addition, a 5% attribution rule would ensure that operators do not undermine the protections to consumers Congress intended by enacting the subscriber and channel-occupancy limits.

⁹ Cablevision suggests a 25% attribution standard, comments at 38, and NCTA suggests a standard of 50%, comments at 21.

¹⁰ Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, August 14, 1992, at 39.

E. "Initial Construction" Means Completion of the Cable System.

Section 617(a) states that the 3-year holding period for newly constructed systems is deemed to begin following "initial construction" of the system. Local Governments disagree with the assertion by Tele-Communications, Inc. ("TCI") that the Commission should interpret this provision as meaning that the holding period begins either at the date on which service to the first subscriber is activated or the date on which a franchise is issued, whichever is earlier.¹¹ Local Governments believe that TCI's suggestion contradicts the plain meaning of the statute, which states that "no cable operator may sell or otherwise transfer ownership in a cable system within a 36-month period following either the acquisition or initial construction of such system by such operator" (emphasis added). The term "initial construction" should be interpreted to mean a constructed system. A system where only one subscriber is receiving service is obviously still undergoing construction; thus, initial construction has not yet been completed, and the holding period should not begin to run.

F. Conditional Waivers Should Not be Allowed.

Local Governments oppose the suggestion by several parties that the Commission should allow "conditional

¹¹ Comments of Tele-Communications, Inc., filed Feb. 9, 1993, at 49.

waivers," i.e., waivers issued by the Commission before approval of the transfer by the franchising authority.¹² Such a position ignores the plain language of Section 617(d), which clearly states that, "the Commission shall not waive such requirements unless the franchise authority has approved the transfer." (emphasis added). The language of the statute is unambiguous. Congress left no room for doubt that the Commission may not grant a waiver from the holding requirement until the franchising authority has approved the transfer. Conditional waivers are not permitted by the statute.

G. Franchising Authorities are in the Best Position to Monitor and Enforce the Channel Occupancy Limits.

While the statute does not specify how channel occupancy limits should be enforced, the Local Governments wish to reiterate their belief that franchising authorities, because of their intimate familiarity with the channel line-ups on local cable systems, are in the best position to monitor and enforce the channel occupancy limits. Local Governments submit that it is simply not true, as suggested by NCTA, that franchising authorities have neither the resources nor the expertise to determine the ownership structure of cable programmers, and thus

¹² See, e.g., comments of NCTA at 51; and Cablevision/Comcast at 25.

should have no part in enforcing the limitations.¹³ Such a broad statement ignores the fact that many franchising authorities are responsible for enforcing a wide range of federal, state, and local laws and regulations as well as franchise provisions. They are much closer to the day-to-day operations of the cable operator. Because the applicability of the channel occupancy limits will vary from system to system, it is essential that the authority closest to and most familiar with the operator ensure that the operator and programmers comply with the limits.

It is impractical for the Commission to undertake to ensure that the thousands of cable systems across America, each with a different blend of programming and with line-ups in a constant state of change, are in compliance with the Commission's rules. Local Governments should be permitted to ensure such compliance. The Commission should assist Local Governments in enforcing such compliance by collecting and distributing periodically to franchising authorities information on the attributable interests in programmers held by cable operators. This information should be furnished by cable operators to the Commission periodically, and should be updated whenever attributable interests change.

¹³ NCTA comments at 35.

III. CONCLUSION

The Local Governments urge the Commission to adopt rules that will advance the purposes and intent of Congress in passing Sections 11 and 13. Consistent with Congressional intent, the Commission's regulations must recognize that Congress viewed Local Governments as essential partners in ensuring that cable operators comply with these provisions. Therefore, especially with regard to the anti-trafficking provision, franchising authorities must have unrestricted access to all relevant information required to ensure compliance and to make sure cable operators provide the quality of service promised in franchise agreements.

Respectfully submitted,

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